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No.

In The

Supreme Court of the United States

GLORIA K. O'SHELL, Petitioner

V.

THE UNITED STATES OF AMERICA BY: United States Department of Army, Louis Caldera, Secretary of Army; and Army National Guard Bureau, Major General William Navas Jr, Director

STATE OF INDIANA BY: Frank O'Bannon, Governor

Respondents

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Gloria K. O'Shell, Counsel of Record
1909 N. New Jersey Street
Indianapolis, Indiana 46202-1618
(317) 926-5168
Attorney for Petitioner

85 pp

QUESTIONS PRESENTED

1. **PRELIMINARY:** On November 21, 1991, the President signed into law an amendment to Title VII's "Section 717(c) (42 U.S.C. 2000e-16(c))", giving federal employees "90 days" in which to file a Title VII lawsuit after receipt of EEOC's right to sue notice. However, the 1978-enacted "30-day" limitation for "mixed issue" cases in the MSPB-administered Adverse Actions Act ("AAA") at 5 U.S.C.7703(b)(2) was not changed. The legislative history to the 1991 amendments is silent on the issue of the "30-day" filing limitation anomaly remaining in 5 U.S.C. 7703(b)(2), which EEOC and the Seventh Circuit continue to enforce to the detriment of all federal employees. Other circuits have held federal employees are entitled to the "90-day" statute of limitations in any Title VII action filed under Section 717(c), regardless of whether they file a "mixed issues" appeal with MSPB before appealing to EEOC.

QUESTION: Whether under basic rules of statutory construction, e.g.: "later law controls" "pari materia" and "legislative history and intent", the 1978-unchanged "30-day" statutory limitation of the "AAA", 5 U.S.C. 7703(b)(2), can lawfully be used by federal courts to deny federal employees filing "mixed issues" appeals with MSPB, before appealing to EEOC, the right to be accorded the

"90-day" statute of limitations contained in Title VII's Section 717(c) (42 U.S.C. §2000e-16(c)) after its enactment date of November 21, 1991, when filing claims under Section 717(c)?

QUESTION 2. When one or more actionable violations of a plaintiff's civil rights occur while a Title VII law-suit is still pending against the same defendants and arise out of the same set of events or similar issues, may those claims be added to the original complaint under the "continuing violations" authority of the 1991-amended FRCP 15(c) and the "relation back" authority of Rule 60(b)?

3. **PRELIMINARY:** Indiana has a 5-year savings and tolling statute: Ind.Code 34-1-2-8 (Appendix H, pg 46), "saved" upon recodification for "any proceeding begun" before July 1, 1998. The Indiana Supreme Court has interpreted this statute to cover "negligence in proscecution" dismissals if "a claim ...met one of the (other) specific situations described therein." Indiana trial rules 54 and 62 permit challenging a "non-final" judgment or order by appeal or filing a Rule 60 motion for relief which then "stays or suspends" the judgment below until final disposition. Article 4 §23 of Indiana's Constitution requires "all laws shall be general and of uniform operation throughout the state".

QUESTION. Under the "full faith and credit" obligations of the federal constitution; the

Tenth Amendment's reservation of powers to the states "not delegated to the United States by constitution"; and the Erie Doctrine (28 U.S.C. §1652), is a federal court in Indiana required to recognize and apply the Indiana Savings Act, Ind. Code 34-1-2-8, as interpreted by the Indiana Supreme Court, to allow refiling of plaintiff's original complaint as a "new acton" on April 13, 1998, after the Court of Appeals denied her appeal and petition for rehearing on March 9, 1998, to the district court's denial of her Rule 60 motion for relief from its dismissal order alleging "negligence in proscecution"?

QUESTION 4. If Indiana's savings law and trial rules are held binding on the federal courts situated in Indiana, what is the correct "abatement" date for determining when the 5-year statute of limitations begins for filing "a new action ... 'after such determination' (and have it) deemed a continuation of the first (action)"?

QUESTION 5. Under the "continuation" language of Indiana's savings statute, what is the tolling effect for federal statutes of limitations applicable to related causes of action occurring between the date the "non-final" judgment or order was issued in the first action and the date any challenge by Rule 60 Motion or Appeal is "disposed" of?

QUESTION 6. When an Indiana federal court

issues a "non-final" dismissal "without prejudice" order, does this leave the situation the same as if suit had never been brought, allowing the district court to deny application of Indiana's savings statute and the non-final/stay provisions of Indiana's Trial Rules ("TR") 54, 62?

7. **PRELIMINARY:** Plaintiff was a commissioned officer in the federally-recognized Indiana Army National Guard component of the armed forces of the United States; was paid entirely with federal funds; and was subject to all the rules and requirements of Titles 10 and 32 of the federal codes and their implementing federal regulations for the armed services. She was involuntarily separated from the Army National Guard and Indiana militia by separately issued "transfer out" orders.

QUESTION. Does plaintiff's employment as a member of the federally-recognized and funded reserve component of the armed forces of the United States require the federal court in Indiana to exercise "original jurisdiction" over her military employment claims against the United States and the state of Indiana under the requirements of Article 3 §2 of the federal constitution; and 28 U.S.C. §§1331, 1343, 1346?

QUESTION 8. Is it permissible for the federal courts to "subsume" non-related military employment claims under Title VII for dismissal purposes even

though plaintiff asserted those claims under other legal authorities?

QUESTION 9. Is "joinder" of two independent and autonomous employers required in federal court for just adjudication and remedies purposes when one employer pays the individual's salary and maintains separate personnel records, while the other employer directs the daily work and training activities of the individual; rates their job performance; and takes the adverse action?

PARTIES AND PARENT OR SUBSIDIARY COMPANIES

All parties to the case are shown in the caption. Respondents are wholly-government owned agencies or federal and state entities that do not require listing under Rule 29.6.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

1. The unpublished opinion of the United States Court of Appeals for the Seventh Circuit, was decided March 25, 1999. Appendix A.

2. The unpublished opinion of the United States District Court, Southern District of Indiana, Indianapolis Division, was issued September 28, 1998. Appendix B.

3. A timely petition for rehearing by the United States Court of Appeals was denied on July 9, 1999. Appendix C.

4. The unpublished, preceding opinion of the United States Court of Appeals was decided December 30, 1997. Appendix D

5. The unpublished, preceding opinion of the United States District Court, was issued June 16, 1997. Appendix E.

6. A timely petition for rehearing the December 30, 1997 appellate opinion was denied March 9, 1998. Appendix F

7. An unpublished order dismissing the original (May 1990) complaint without prejudice was issued by the United States District Court on April 3, 1992. Appendix G

JURISDICTION

This Petition for Certiorari is based on a decision by the United States Court of Appeals for the Seventh Circuit issued on March 25, 1999. Appendix A.

A timely petition for rehearing was denied on July 9, 1999. Appendix C

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Diversity jurisdiction of the district court was invoked under 28 U.S.C. §1331: plaintiff being a citizen of Indiana and defendants citizens of both Indiana and Washington D.C.

Subject matter jurisdiction of the district court as to plaintiff's federal civil service employment claims for wrongful suspensions and discharge was invoked under Title VII: 42 U.S.C. §§1981a, 2000e as amended in 1991; the Prohibited Personnel Practices Act of 1978 ("PPPA"), 5 U.S.C. §§2301-2302, made actionable by the procedural Adverse Actions Act of 1978, 5 U.S.C. §§7701-7703; the 1978 Whistleblowing provisions of 5 U.S.C. §§1209, 1212, 1214, 1221 as amended; and the jurisdictional authorities of: 28 U.S.C. §1331, general federal question; §1343(a), redress for violation of civil rights; and §1346, claims against the United States).

Original and pendent jurisdiction of the

District Court was asserted over plaintiff's military employment claims for breach of contract and civil rights violations in her dual status as an active member of the Army's National Guard component and Indiana militia. Authorities relied on were: the First, Fifth, Fourteenth Amendments and Supremacy Clause of the United States Constitution; 42 U.S.C. §1983 of the Civil Rights Acts together with 42 U.S.C. 2000d, h and Executive Order 12550 for non-federal receipients of federal funds; 28 U.S.C. §1331, general federal question; 42 U.S.C.§§1985-1986, prohibiting conspiracies to deprive persons of civil rights which attaches original jurisdiction under 28 U.S.C. §1343(a); 28 U.S.C. §§1346(b)(1), and §2671: tort claims.

The district court denied jurisdiction over plaintiff's dual federal/state military employment claims under 28 U.S.C. §1367(c).

The appellate court did not address denied jurisdiction over plaintiff's military employment.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Federal and state constitutional and statutory provisions relied on are shown at Appendix H, consisting of 16 pages.

STATEMENT OF THE CASE

Plaintiff, a white female, was employed as a federal civil service employee by Department of Army ("Army) for almost 27 years at the time

discharged January 10, 1992, by the same active Army National Guard Bureau ("NGB") officers who unsuccessfully attempted to discharge her in June 1988, on the pretext of having a "messy desk". Army employed plaintiff as a federal auditor in NGB's laison office located in Army's Finance and Accounting Center, Fort Harrison, Indiana.

The first (June 3, 1988) discharge was appealed to the Merit Systems Protection Board ("MSPB") under the "mixed issues" authority of 5 U.S.C.§§7701-7702. After a 2-day hearing in October 1988, MSPB restored plaintiff to duty after finding defendants committed continuing sex discrimination and retaliation violations of plaintiff's Title VII rights

After return April 1989, plaintiff filed several never responded to EEO complaints with Army; and then sued Army and NGB defendants May 17, 1990, under "exhaustion of remedies" provisions, 5 U.S.C. §7702(e), 42 U.S.C. §2000e-16(c). She sought injunctive relief; backpay for unremedied suspensions and denial of a GS12 promotion.

During pendency of the 1990 lawsuit, plaintiff was compelled to file five more EEO complaints against the same defendants sued due to their continued harrassment and threats of discharge. Due to non-response (App.I), plaintiff alleged these complaints also fell under

5 U.S.C §7702(e), 42 U.S.C.§2000e-16(c) 180-day "exhaustion" provisions in her 1993 Amendment.

Upon receipt of court orders setting the 1990 lawsuit for trial on June 8, 1992, defendants discharged plaintiff on January 10, 1992, for alleged insubordination. A "mixed issues" appeal was timely filed with MSPB January 1992 (5 U.S.C. §7702); requesting consolidation of all pending EEO complaints; and asserting whistleblowing and non-retaliation rights under 5 U.S.C. §§2301-2302, 1214-1221; and 42 U.S.C. §2000e-3(a), 16.

On February 12, 1992, plaintiff's attorney filed a STAY request with his withdrawal (Docket Entry 504, App.No.1,Exh.C, Appeal). In March 1992, the district court issued a 30-day "show cause" order but did not address the STAY request. Due to a mail mixup, plaintiff did not respond timely. On April 3, 1992, the court dismissed the suit "without prejudice"for "failure to proscecute".

Plaintiff timely appealed MSPB's denial of the January 1992 discharge appeal to EEOC (5 U.S.C. §7702(b)). EEOC's Right to Sue notice, received November 1992, gave "30 days" to file an EEO lawsuit. In reliance on the November 21, 1991, "90-day" filing amendment to 42 U.S.C. §2000e-16(c), on February 8, 1993, plaintiff filed an Amended and Supplemented Complaint to the original 1990 action under FRCP Rule 15(c)(1991) and Rule 60(b).

(Argued AppBrf,pp 29-32;ReplyBrf pp13-19). And cited reliance on the 180-day non-response provisions of 5 U.S.C. §7702(e) for the five EEO complaints filed before discharge. 5 U.S.C.§7702(e) directs "an employee shall be entitled to file a civil action to the same extent and in the same manner as provided in Section 717(c) of the Civil Rights Act of 1964 (42 U.S.C.§2000e-16(c)" (Argued: AppBrf pp 12-13,28-29; ReplyBrf pp 7-11)

Because of timing and nexus, the February 1993 Amended Complaint filing also included claims against Army, NGB and Indiana National Guard defendants for breach of federal and state employment contracts entered into on August 14, 1980, and for involuntary transfer of plaintiff without statutory and regulatory-prescribed due process to the inactive/unpaid Standby Reserve on March 1,1989, effectively ending her military career. Plaintiff alleged termination of her military employment was obtained through conspiracy of NGB defendants at Fort Harrison with Indiana National Guard officers.

"Abuse of command" and civil rights complaints were filed with the Inspector Generals of both Indiana and Army. Army did not respond and they were denied by the state's Adjutant General. An employment discrimination complaint was filed with the Indiana Civil Rights Commission who refused jurisdiction on June 25, 1991, stating that

plaintiff's "relationship with the Indiana Army National Guard was as a 'uniformed member of the United States armed forces' and not as an employee within the meaning of the Indiana Civil Rights law" (App. I) Indiana acknowledged receipt and docketed her Tort Claims Notice as FileI911790 on September 24, 1991, but did nothing further.

Plaintiff alleged her involuntary separation violated statutory rights as a commissioned officer to have a "peer board review" and approval by the Governor before separation (Ind.Code 10-2-3-6); and civil rights violations of federal and state constitutions, the Uniform Code of Military Justice and regulatory customs and usages of the United States Armed Forces prescribed by Indiana for its armed forces (Ind.Code 10-2-3-10).

All claims asserted in the February 1993 Amended Complaint, refiled as a "new action" on April 13, 1998, were filed under the 1991 "continuing violation" amendments to FRCP 15(c) and Rule 60(b) "relation back" authority since they arose out of the same fact situation, addressed the same or similar issues, and named the same defendants sued May 17, 1990.

For four years, the district court took no action. The court then denied the Rule 15(c) Amendment/Supplemental request. The Rule 60(b) Motion for Relief from its previous dismissal

order of April 3, 1992, was denied April 16, 1997. Plaintiff timely appealed on June 11, 1997. The Appeals Court affirmed the judge's discretionary denial of a Rule 60(b) Motion on December 30, 1997. Plaintiff timely petitioned for rehearing which was denied March 9, 1998.

Plaintiff timely refiled her claims as an independent complaint April 13, 1998, in reliance on: (i) FRCP 60(b); (ii) Indiana's Savings and Tolling statute(Ind.Code 34-1-2-8); (iii) the Erie Doctrine(28 U.S.C. §1652), combined with the "full faith and credit" obligations of Article 4 §1 of the United States Constitution; and, (iv) equitable application of FRCP/Ind.Trial Rules 54, 62, establishing "non-finality" of any judgment in Indiana permits challenge by either appeal or Rule 60 motion which stays and suspends the initial order or judgment until final "disposition".

By unpublished order issued September 28, 1998, the district court dismissed plaintiff's federal civil service employment claims with prejudice and denied "pendent jurisdiction" over state claims relative to her federal-state military employment in the Indiana Army National Guard. First "subsuming" them all under Title VII; finding the Title VII action untimely; and citing lack of jurisdiction under the discretionary authority of 28 U.S.C. §1367(c). The

district court held:

(i) A 1993 change to Indiana's Savings statute, Ind.Code 34-1-2-8, barred its application to "negligence in proscecution" dismissals. But did not address passage of the Recodification Act of 1998, on July 1, 1998 (P.L. 1-1998); which made the Act of "no effect" for "any proceeding begun" before July 1, 1998. (Argued: App.Brf pp 21-23; ReplyBrf pp 5-7)

(ii) The federal judge stated agreement with other circuit rulings which did not address the Indiana's Savings statute, holding plaintiffs have five years after a "failure/abatement" determination to refile their claims as a "new action (which shall be) deemed a continuation" of the first action. Nor did he adress Indiana's trial rules staying and suspending any judgment in Indiana until a Motion for Relief or Appeal is "disposed of". (Argued: ReplyBrf,pp3-7)

(iii) In holding plaintiff "did not file this action within the '30 day period' (pertaining) to (EEOC's) right to sue letter", he cites to pre-1991 initiated lawsuits which do not address Title VII's "90-day" amendment.

On March 25, 1999, the appellate court summarily affirmed the district court's denial of the April 13, 1998, complaint; but did not address her military employment and conspiracy claims; sta-

tutory construction arguments; or application of Indiana savings law and trial rules etc.

On July 9, 1999, plaintiff's timely-filed petition for rehearing was denied by a three-judge panel without discussion.

REASONS FOR GRANTING THE WRIT

I. Title VII's 1991-enacted "90-day" Statute of Limitations directly conflicts with the 1978-unchanged "30-day" filing limitation for "mixed issue" cases contained in the "Adverse Actions Act" ("AAA") (5 U.S.C. §7703(b)(2)), and should be resolved for the benefit of all federal employees consistent with the legislated history and stated intent of the 1991 Amendments.

The conflict in filing limitations between the "30-day" filing limit in the "AAA" and the 1991-expanded "90-day" filing limit of Title VII's 42 U.S.C. §2000e-16(c), actually and prospectively affects over a million or more federal, postal, legislative, judicial and other employees identified at 29 CFR 1614.103(b). Thousands of these employees are subjected each year to appealable adverse actions few of which proceed into federal court or are successful according to MSPB's annual reports.

Most adverse actions are countered with the affirmative defenses set forth for "mixed issue" cases in 5 U.S.C. 7702(a)(1)(B) and the "PPPA"

5 U.S.C. 2301-2302(b)(1),(d). That is: discrimination on the basis of race, color, religion, sex or national origin, retaliation, age; sex as it relates to equal pay; handicapping condition; marital status or political affiliation; or "any rule, regulation or policy" implementing these Acts, including Executive orders and the federal Constitution (5 U.S.C. §2301(b)(2); 42 U.S.C. 2000e-16(e)).

5 U.S.C. 7701(c)(2)(3) requires setting aside "any prohibited personnel practice described in Section 2302(b)". Section 2302(b)(11) prohibits:

> "tak(ing) or fail(ing) to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing or directly concerning the merit system principles contained in Section 2301 of this Title"

5 U.S.C. §2301(b)(9)(A) and 2302(b)(9)(A)-(B), (11), reenforce Title VII's prohibitions against retaliation. (42 U.S.C. 2000e-3(a), 16)

Under the "mixed issues" proceedings set out in 5 U.S.C.§7702, an individual appeals first to MSPB; and, if MSPB's decision is negative, then appeals to EEOC or files a Title VII lawsuit. However, most judges require a "right to sue" letter from EEOC prerequisite to filing suit; and, EEOC regulations establish the agency's "final

decision" in an adverse action must be appealed to MSPB first and not EEOC (29 CFR §§1614.302(d)(ii)(3), §1614.310 (7-1-1998 ed.) Therefore, there is no escaping possible application of the "30-day" filing conflict in 5 U.S.C. 7703(b)(2).

The time required to merge and master personnel, agency, MSPB and EEOC regulations with the federal acts, Executive Orders and union contracts to determine individual rights cannot be overestimated as was recognized in Butler v West, 164 F3d 634,638 (D.C.Cir 1999), stating:

> "When the discrimination is alleged as a violation of Title VII, the federal employee 'must negotiate and exhaust the complex administrative regime' that governs Title VII public employment cases in addition to the usual procedures for challenging an adverse personnel action under the Civil Service Reform Act."

The legislative history and stated Congressional intent behind the 1991-amended Section 717(c), emphasized the "90 days" filing right was absolutely critical to enable federal employees making it through convoluted "mixed issues" proceedings time to obtain attorney representation and file a lawsuit. In contrast to appellants who are generally without a job, secondary income or substantial savings to pay

thousands for advance retainer fees, federal supervisors are immediately and continuously provided with unlimited competent, free legal representation at the taxpayers expense.

Since it took several years for EEOC to revise its 29 CFR 1613 regulations to conform to the 1991 amendments to Title VII, plaintiff relied on the enactment date of November 21, 1991, and the legislated history and stated intent of Section 717(c) amendments to allow her "90 days" to prepare and file her Title VII Amended and Supplemented Complaint in February 1993, which contained the January 1992 discharge and earlier actionable events, rather than the "30 days" contained in EEOC's right to sue letter. I.E. "Regulations cannot trump the plain language of the statutes." Robbins v Benton, 41 F3d 1195, 1198 (CA7 1994).

Plaintiff also relied on the "plain meaning" of Section 7703(b)(2) which directs:

> "Cases of discrimination 'subject to' the provisions of section 7702 of this title 'shall be filed' under Section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(c)..."

This language parallels Section 7702(e)(1) which states:

> "Notwithstanding any other provision of law

> ...an employee 'shall be entitled to file a civil action 'to the same extent and in the same manner as provided in Section 717(c)'..."

"It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which it is framed; and if that is plain, the sole function of the court is to enforce it according to its terms." Caminett v U.S., 242 US 470, 485 (1916)

However, the last sentence of Section7703(b)(2), unchanged since 1978, directs: "Notwithstanding any other provision of law, any such case filed under any such section 'must be filed within 30 days' after the date the individual filing the case received notice of the judicially reviewable action under...section 7702".

The legislative history to Title VII's 1991 amendments makes no reference to the "30-day" filing conflict in 5 U.S.C. 7703(b)(2). But 5 U.S.C. 2302(d) of the "PPPA", establishing subject matter limits for the "AAA" directs:

> "This section shall not be construed to extinguish or lessen . . . **any right or remedy available to any employee** ...in the civil service under...section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16)"

There is no record that EEOC or other participating federal agency, all of whom were fully

knowledgeable of this conflict, did anything to bring this conflict to the attention of legislators for resolution. However, it is unreasonable to believe that the 1991 Congress would have intended this last sentence of 5 U.S.C. §7703(b)(2), standing alone and taken out of context with the immediately preceding, directive language, to "gut" the "90-day" filing right it took federal employees over twenty years to obtain on par with private sector employees for defeating them when filing "mixed issues" claims under Title VII in federal court.

Plaintiff argued statutory construction principles of "legislative history and intent", "pari materia" and "later law controls" should be applied by the district and appellate courts to determine this issue, consistent with a substantial body of federal and state law generally compeling this approach when two conflicting statutory directives control the same identical issue.

The district court asserted plaintiff's failure to file within the 30 days directed in EEOC's right to sue letter defeated her Title VII claims filed in 1993, and refiled after abatement in April 13, 1998. But the court did not address any statutory construction arguments. And cited only pre-1991 initiated lawsuits which did not address the "90-day" amendment to Title VII.

However, the judge did state : "There is no reason, in either legal or practical terms to use 'any period of limitation other than that prescribed in Title VII itself to determine when suit had to be brought." App. B

In its affirmance of the district court's decision, the appellate court likewise did not address plaintiff's statutory construction arguments, noting only that: "But whether she is 'right or wrong' (as to the "longer 90-day limit imposed by 42 U.S.C.2000e-5(f)(1) (sic)") 'is of no consequence' given her five-year delay" in filing which "missed the deadline". Neither court specified the beginning date for the "5-year period" they referred to. App. A

Over the eight years since enactment of the "90-day" amendment, there is increasing conflict in circuit rulings addressing the irreconcilability of the "30-day" limit in 5 U.S.C.7703(b)(2) versus the "90-day" filing limit of Title VII's Section 717(c) that should be resolved by the Supreme Court for the benefit of all federal and other affected employees. In contrast to the Seventh Circuit's adherance to "30-day" rulings arising from lawsuits pre-dating the 1991 enactment, other circuits are using divergent rationales to ensure application of the "90-day" filing right. I.E.::

(i) Becton v Pena, 946 F.Supp84, 85-87 (DDC 1996) discussed the "procedural anomaly that Congress...did not intend (as to forcing) different time limits...for filing Title VII suits depending on which administrative body--EEOC or MSPB--initally hears a federal employees claim." The court discussed the legislative history wherein Congress concluded a "30 day limitation period for filing suit against the federal government is, in most instances, 'simply too short' to allow plaintiffs adequate time to prepare and file their claims in federal court; and held the 30-day limitation in Section 7703(b)(2) is "no longer jurisdictional under the 1991 Amendments to 42 U.S.C. §2000e-16(c) extending a 90-day statute of limitations for discrimination actions".

(ii) Forest v USPS, 97 F3d 137,140-141 (CA6 1996), relying on Landgraf v USI Film Prods, 114 S.Ct 1483, 1499 (1994) and Wilson v Pena, 79 F3d 154,162 (D.C.Cir 1996), summarily held that the 1991 Acts 90-day limitation "was good law when Forest filed his complaint and thus Forest filed his complaint in a timely manner."

(iii) Cohen v Austin, 833 F.Supp 512, 516-517 (ED Pa 1993) argued that EEOC's refusal to review an MSPB decision, as stated in plaintiff's right to sue notice, was not the "judicially

reviewable action" referred to by Congress in 5 U.S.C.§7703(b)(2) since EEOC's source authority to issue a "final decision" may only be asserted under Title VII's 42 U.S.C. 2000e-16(c). Further, under Section 7702's express terms, only the agency, MSPB or the Special Panel issue the "judicially reviewable action" decision cited to at 5 U.S.C. §§7702(a)(2);(b)(3),(5)(A)-(B); (d)(2)(A). EEOC only issues a "consideration determination" on a Board decision (Section 7702 (b)(1)); which "may not be used in any 'judicial proceeding'"(§7702(b)(2)). Citation to its own regulations in its right to sue letter indicates EEOC's belief that 42 U.S.C. §2000e-16, not 5 U.S.C. 7702 is the sole source of its authority.

(iv) Landgraf, Id. at pp 1497-98 et al, relative to defendants conduct and events preceding the "90-day" amendment to Section 717(c) held: "Changes in procedural rules while a suit is pending are not usually considered retroactive because such changes do not impose a new burden upon the parties" (114 S.Ct at 1502). "Rules of procedure regulate secondary rather than primary conduct. Therefore, institution of a new procedural rule after the conduct giving rise to the suit does not make that rule retroactive." Citing McBurney v Carson, 99 U.S. 567, 569 (1878). E.G. the "action" regulated by the

amended 90-day limitations period is plaintiff's "filing" of a lawsuit which occurs after passage of the 1991 civil rights act--not defendants conduct which may have occurred before the November 21, 1991 enactment date.

II. Primacy of state common law in substantive matters not otherwise delegated to the United States by constitution or statute should require federal courts to permit filing of independent complaints as "new actions" and tolling of otherwise applicable statutes of limitations under state savings and tolling statutes, and trial rules.

Under the "full faith and credit" obligations of the United States Constitution, Article 4 §1 and the Tenth Amendment, reserving all powers to the states that are not delegated to the "United States by Constitution", the Supreme Court long ago established the Erie Doctrine, codified at 28 U.S.C.§1652, requiring that the "laws of the several states, except when the Constitution or ...Acts of Congress otherwise require or provide 'shall be regarded as rules of decision' in civil actions in the courts of the United States, in cases where they apply." Erie v Tompkins, 304 US 64,77-79 (1938) expressly held:

> "Except in matters governed by the federal constitution or by Acts of Congress, the

law to be applied in any case is the 'law of the state'...whether declared in a statute or by its highest court in a decision... Congress has no power to declare substantive rules of common law in a state...and no clause in the Constitution purports to confer such a power upon the federal courts." The Supreme Court has declared: "It is inadmissable that there be one rule of state law for litigants in the state courts and another rule simply because of diverse citizenship for litigants in federal courts." Fidelity Union Tr. Co. v Field, 311 US 169, 177-180 (1940)

Due process and equal protection of the law for Indiana citizens is guaranteed by the Indiana Constitution. Article 4 §23 requires: "all laws shall be general and of uniform operation throughout the state." Article 4 §27 holds: "every statute is a public law" which the General Assembly is required to "grant to any citizen or class of citizens...upon the same terms (which) shall...equally belong to all citizens."

Since 1881, Indiana has had its own (5-year) savings and tolling statute: Ind.Code 34-1-2-8, saved by the July 1, 1998, Recodification Act. E.g.: Ind.Code 34-7-1-1(1998) states: "The substantive operation and effect of the 'prior civil law and procedure' continue uninterrupted as if

the recodification act of...1998...had not been enacted."

(ii) Ind.Code 34-7-1-3(a)(1998) states: "The recodification act of...1998...does not affect: 1) any rights or liabilities accrued;...3) any violations committed; 4) any proceedings begun... 9) the validity, continuation or term of any contracts...executed...before...July 1, 1998...Those rights, liabilities, penalties, offenses, proceedings...contracts...'continue and shall be imposed and enforced under prior civil law and procedure' as though the recodification act of 1998...had not been enacted."

(iii) Ind.Code 34-6-2-113.5(1998) states: "Prior civil law and procedure for purposes of Indiana Code 34-7 refers to the statutes that are repealed or amended in the Recodification Act of ...1998...as the statutes existed before the effective date of applicable or corresponding provisions" (Argued App.Brf pp 20-25)

The lower courts did not address these 1998-enacted savings provisions, maintaining only that "negligence in proscecution" dismissals were excluded from coverage. However, plaintiff filed her Amended Complaint on February 8, 1993; and, after "abatement" on appeal, filed a "new action" on April 13, 1998. Both filings preceded the July 1, 1998, Recodification Act and should be saved.

The Indiana Supreme Court interpreted Ind. Code 34-1-2-8 to cover "negligence in proscecution" dismissals if "a claim would otherwise be saved by the statute because it met one of the (other) specific situations described therein." Vesoloski v Repay, 520 NE2d 433,434 (Ind 1988) The district court recited Indiana's ruling and "tolling" language used: "If after the commencement of an action, the plaintiff fails therein ...a new action may be brought within five (5) years after such determination and 'be deemed a continuation of the first', for the purposes herein contemplated," and then applied it to Indiana's Abele v A.L.Dougherty Overseas Inc, 192 F.Supp 955, 956-57 (N.D. Ind 1961): "the statute 'saves employment action brought in state court after expiration of original statute of limitations when brought within five years after identical claim 'dismissed without prejudice' by federal district court." App. A

However, the lower courts inequitably rejected application of Indiana's "continuation" language to plaintiff's case, holding a "dismissal without prejudice leaves the situtation the same as if a suit had 'never been brought'", ignoring their cited case of Abele, Id. They also cite cases from other circuits, not address-Indiana law to hold that: "in the absence of a

specific 'statute' to the contrary, there is 'no tolling' of the statute of limitations for the period of time during which the action so dismissed was pending". The Seventh Circuit held in another Indiana case: Morris v Jenkins, 819 F2d 678 (7th Cir 1987): "...statutes have been passed in nearly all of the states, providing for a renewal of actions which have failed on account of some matter not involving the merits. These statutes...contemplate...a new and distinct suit shall be commenced 'which shall be treated as a continuation' of such former suit."

Both lower courts ignored plaintiff's arguments that Indiana's savings statute must be read in the context of Indiana trial rules ("TR"). Similar to FRCP 54(b), Indiana's TR54(B),(E)(2) defines any "non-final" order or judgment as one adjudicating "fewer than all the claims...rights and liabilities of fewer than all the parties (which) 'shall not terminate an action as to any of the claims or parties." No limiting criteria is assigned. Any order or judgment may then be "challenged...by appeal, motion and the like".

Ind.TR 62(B)(4)-(5) establishes proceedings to enforce a judgment are "stayed and suspended" upon "filing and 'disposition' of...(4) a motion for relief from a judgment or order made pursuant to Rule 60, or (5) an appeal."

The "full faith and credit" obligations of the federal constitution compel recognition of Indiana's constitutional requirement at Article 4 §23, that "all laws shall be general and of uniform operation throughout the state." In refusing to apply Indiana law as enacted and interpreted by the state's legislature and highest court, the federal courts have denied application of the Erie Doctrine, 28 U.S.C. §1652, in Indiana. (Argued: Reply Brf, pp 3-7)

Requiring the federal courts to comply with the Erie doctrine and "full faith and credit" obligations of the U. S. Constitution for application of state substantive law affects every claimant proceeding before a federal court. States enact savings acts and trial rules for the benefit of state citizens and rely on them to be applied "equally" to all citizens in federal as well as state forum courts. Under current rulings of the Seventh Circuit, federal courts may now "pick and choose" among other state rulings to circumvent and avoid state forum law with which they do not agree.

The tolling case of Board of Regents v Tomano, 446 US 478, 481-482 (1980), held: "The need for uniformity, while paramount under some federal statutory schemes, has not been held to warrant the displacement of state statutes of limitations

for civil rights actions". The Supreme Court has reversed decisions below on the ground that the prior action was a timely suit which "tolled" the statute of limitation. Burnett v NY Central RR Co., 380 US 424 (1965)

Indiana's savings act and trial rules are "subject matter blind" as to any lawsuit in which a "failure or abatement occurs" or in which an appealable "non-final" order or judgment arises. Plaintiff asserts the "plain language" of Indiana's savings law and trial rules at issue deny federal judges "discretionary authority" to disregard them under their (29 U.S.C.§453) judicial oath. State citizens are guaranteed due process rights legislated for their benefit by elected state representatives in federal forum courts, which calls for the supervisory enforcement powers of the Supreme Court.

Only by according plaintiffs, as a private attorney-general, the full range of federal and state law allowing continuing response to retaliatory actions, without having to undertake cost prohibitive, piecemeal litigation subject to "claims preclusion" barriers, may the aims and objectives of the peoples' federal and state elected representatives be achieved.

III. Original federal question jurisdiction of federal courts over claims arising under the constitution and statutes of the United States

should not be subject to the discretionary denial authority of the federal courts.

By "subsuming" all of plaintiff's military employment claims under Title VII and then dismissing them for "untimeliness", the lower courts avoided addressing their merits. However, the district court recognized plaintiff's status as a "uniformed member of the...Indiana National Guard in a part-time position;" and reliance on: "42 U.S.C. §1983; 18 U.S.C. §241; and 42 U.S.C. §1985: conspiracy to interfere with civil rights; and federal and state Military Acts."

The district court correctly stated Title VII covered "only civilians" in military departments. But then held: "discrimination-based claims pursuant to federal law 'other than Title VII' cannot be maintained and must be dismissed;" dismissing them as "pendent state law claims" for "lack of jurisdiction" under 28 U.S.C §1367(c).

Plaintiff submits this "subsumption" approach is a "non-final" judgment under FRCP/Ind.TR 54, as "all the claims, rights and liabilities of all the parties" are not adjudicated. (Argued: Reply Brf, pp 3-5) And denies plaintiff and all others similarly situated equal access to the federal courts whenever interrelated supervisors are in a position to retaliate against them, directly or indirectly, in both civilian and military careers.

However, the principles of "claim preclusion", compel bringing both types of employment claims into one federal complaint when the same or interrelated defendants are involved and the facts of the case are such as to give rise to a "conspiracy" action. Lower court rulings now put plaintiff and other reserve members in the precarious, "catch 22" position of being denied review of their military employment claims whenever submitted with Title VII-covered claims.

This "subsumption" by Title VII of all other causes of action denies otherwise controlling "original jurisdiction statutes such as: 28 U.S.C. §1331: civil actions arising under the constitution, laws or treaties of the United States; 28 U.S.C. §1343(a): any civil action authorized to recover damages for 42 U.S.C. §1985 civil rights violations; redress 42 U.S.C. §1983 violations; recover damages or secure relief under any Act of Congress providing for protection of civil rights; 28 U.S.C. §§1346(b)(1), 2671: claims against the United States" for torts of government employees, including "military departments" and "members of the National Guard"

Plaintiff furnished evidence she held dual employment status with both the federally recognized forces of the United States (national guard component) and the Indiana National Guard.(Reply

Brf,App.No.2) At no time was Title VII asserted for alleged civil rights violations and breach of separate military employment contracts cover-her 17-year career and preceded Army's employment in NGB's laison office. There was no connection between her civilian and military jobs except for interrelated employers.

Titles 10 and 32 of the United States Code establish the federal basis and independent nature of NGB as a military organization, separate from Army. Indiana is clearly a separate employer. (Argued: Appel.Brf,pp 35-39; Reply Brf,pp 1-2) Every military personnel action had a separate federal and state authorizing order. All training assigned was for a federal mission; all pay received was from federal funds. Plaintiff took separate oaths to serve the President and Governor of Indiana as separate "Commanders in Chief" upon entry into the Indiana National Guard in 1980.

The Title VII "subsumption" dismissal of plaintiff's military employment claims leaves her and all other reservists denied redress under the "myriad" of federal laws relied upon and cited to that should compel the federal court to exercise "original jurisdiction", separate from civilian employment claims. No subsumption case cited by the lower courts addressed a "mixed" employment complaint containing separate military and

civilian claims against different employers. But reservists and guardsmen frequently work for supervisors who are in a position to affect both their civilian and military careers.

EEOC makes it a "general rule" to join separate government employers who "bear joint responsibility for an act of alleged discrimination" to ensure "all agencies are joined which are parties indispensable to just adjudication of a complaint." Smith v Navy, 86 FEOR 3238 (1986). Compulsory and permissive joinder of claims and parties are standard and essential to judicial economy under federal and state civil procedures. There was nothing "unique" in joining interrelated defendants and causes of action in one complaint. Only the lower courts' "subsumption" response and denial of "original jurisdiction" was unique. Mindes v Seaman, 453 F2d 197,201 (5th Cir 1971), citing NeSmith v Fulton,615 F2d 196, 201-02 (CA6 1980):

> "A court is required to determine whether the case involves an alleged 'violation of a constitutional right, applicable statute or regulation and whether intraservice remedies have been exhausted. If (review is granted), the court is...to weigh the nature and strength of the challenge to the military determination, the potential injury to plaintiff if review is refused, the type and degree of anticipated

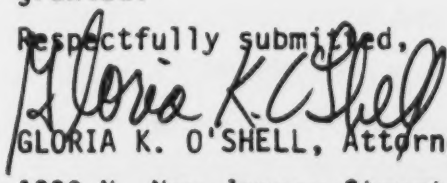
interference with the military function and ...extent to which military discretion or expertise is involved in the challenged decision." Plaintiff's military employment claims against federal and state employers raises questions under 28 U.S.C. §1331, which confers "power to decide whether or not the federal question itself has merit and is well founded." Mt-Dakota Utilities Co v NW Public Svc Co., 341 US 246,249 (1991). Quoting from Justice Holmes: "If the plaintiff makes a substantial claim under an Act of Congress, there is jurisdiction whether the claim ultimately be held good or bad." The Fair v Kohler Die Co, 228 US 22, 25 (1913).

The Supreme Court's supervisory enforcement authority is required to prevent denial of original jurisdiction over federal questions when litigants file mixed military and civilian employment claims in the same federal lawsuit.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



GLORIA K. O'SHELL, Attorney for Petitioner
1909 N. New Jersey Street, Indianapolis,
Indiana 46202-1618 - (317) 926-5168

Dated: October 6, 1999 (*Reduced per Order)

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Submitted March 24, 1999*
Decided March 25, 1999

UNPUBLISHED ORDER
NOT TO BE CITED PER
CIRCUIT RULE 53

Before

Hon. William J. Bauer, *Circuit Judge*
Hon. Joel M. Flaum, *Circuit Judge*
Hon. Daniel A. Manion, *Circuit Judge*

No. 98-3750

GLORIA K. O'SHELL,
Plaintiff-Appellant,
v.
UNITED STATES OF AMERICA; ROBERT M. WALKER, Acting Secretary of the Army; MAJOR GENERAL WILLIAM NAVAS, JR., Director, Army National Guard Bureau; et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division

No. IP 98-0494-C-T/C

John D. Tinder,
Judge

ORDER

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*After an examination of the briefs and record, we have concluded that oral argument is unnecessary, and the appeal is submitted on the briefs and record. *See* Fed. R. App. P. 34(a).

In 1990, Gloria O'Shell, then a civilian employee of the United States Army, commenced an action alleging that various dependants, all of them bearing some connection to the Army, discriminated against her on the basis of her gender. In April 1992, the district court dismissed O'Shell's case without prejudice for failure to prosecute. Subsequently O'Shell moved for relief under Fed. R. Civ. P. 60(b), and we affirmed the district court's denial of the motion. *O'Shell v. United States Dept. of the Air Force*, 132 F.3d 36, 1997 WL 800875 (7th Cir. 1997) (unpublished order). In January 1992, several months before the district court dismissed O'Shell's case, the Army discharged her. O'Shell filed a discrimination charge with the EEOC and, in November 1992, received a right-to-sue letter.

More than five years later, in April 1998, O'Shell filed this suit challenging her 1992 discharge and reiterating the allegations made in her 1990 action. O'Shell claimed that her rights had been violated under a host of provisions, including Title VII of the Civil Rights Act of 1964 and the First, Fifth and Fourteenth Amendments. All of her claims, of course, are subsumed under Title VII, "the exclusive judicial remedy for claims of discrimination in federal employment." *Brown v. Gen. Serv. Admin.*, 425 U.S. 820, 835 (1976); *see also Waid v. Merrill Area Pub. Sch.*, 91 F.3d 857, 861-62 (7th Cir. 1996) ("Title VII provides a comprehensive statutory scheme for protecting rights against discrimination in employment"). And, although O'Shell names several, only the Secretary of the Army is a proper defendant. *See* 42 U.S.C. § 2000e-16(c); *Espineuva v. Garrett*, 895 F.2d 1164, 1166 (7th Cir. 1990).

On Appeal, we need only address whether the district court correctly held that this Title VII action is time barred. Like the district court, we find that it is. The EEOC issued O'Shell a right-to-sue letter on November 14, 1992. In the absence of special circumstances giving rise to waiver, estoppel, or equitable

tolling, a "mixed" case involving both a complaint of discrimination and a challenge to job actions (such as O'Shell's dismissal) appealable to the Merit Systems Board must be filed within 30 days after receipt of the notice of right to sue. 5 U.S.C. §§ 7702(a)(1)(B)(I); 7703(b)(2); *Blaney v. United States*, 34 F.3d 509, 512 (7th Cir. 1994); *Butler v. West*, 164 F.3d 634, 638 (D.C. Cir. 1999). O'Shell argues that, even though hers is a mixed case, the longer 90-day limit imposed by 42 U.S.C. § 2000e-5(f)(1) should apply. *See Williams-Guice v. Board of Educ. Of Chicago*, 45 F.3d 161, 163 (7th Cir. 1995) (Title VII sets 90-day limit). But whether she is right or wrong is of no consequence given her five-year delay in filing. Moreover, we reject O'Shell's argument that the dismissal of her 1990 case without prejudice preserved her cause of action for filing at a later date. Dismissal without prejudice has no consequence on the running of the statute of limitations. *See Conover v. Lein*, 87 F.3d 905, 908-909 (7th Cir. 1996). O'Shell filed her suit at least five years too late, on April 13, 1998. She missed the deadline, and the record reveals no circumstances that would justify waiver, estoppel, or equitable tolling.

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

GLORIA KAY O'SHELL,	)	
Plaintiff,	)	
vs.	)	IP 98-494-C-T/G
	)	
UNITED STATES OF AMERICA,	)	
et al.,	)	
Defendants.	)	

JUDGMENT

The court, having this day made its Entry,

IT IS THEREFORE ADJUDGED that the plaintiff's federal claims are **dismissed with prejudice** and that the any pendent state law claims are **dismissed for lack of jurisdiction.**

/s/ John D. Tinder
JOHN D. TINDER, Judge
United States District Court

Dated: 9/28/98

ENTRY DISCUSSING PENDING MOTIONS

I. Introduction

In *Homola v. McNamara*, 59 F.3d 647, 650 (7th Cir. 1995), Judge Easterbrook made the following observations for a panel of the Seventh Circuit Court of Appeals:

Litigation is society's way to resolve disputes. Courts invite parties to make their evidence and arguments known. Appellate

courts correct errors. After the process has run its course, there should be peace between former adversaries. Many persons do not see litigation this way, however. They adopt a never-say-die attitude. If the first case goes against them, then some chicanery must be to blame. Now if the courts are unable to separate truth from fiction - the premise of this attitude toward the results of litigation - one would suppose that remedy lies in a political forum, or perhaps in an occasion for writing an expose. Yet many litigants who refuse to accept judgments against them see their balm as - more litigation!

This is a case which would have served as a paradigm for the foregoing mulish description.

This action is a sequel to plaintiff Gloria Kay O'Shell's claims of discrimination, retaliation, and creation of a hostile work environment brought in *O'Shell v. Department of the Air Force*. IP 90-1373-C-M/F (S.D.Ind.April 3, 1992). This earlier case was dismissed for failure to prosecute. O'Shell filed post-judgment motions, which were denied. The denial of these motions was affirmed on appeal in *O'Shell v. Department of the Air Force*. No. 97-2470 (7th Cir. December 20, 1997) (unpublished). O'Shell then filed the present action to carry on her legal siege of her former employer and associated entities and individuals.

II. Background

The operative pleading setting forth O'Shell's claims in this case is her complaint, filed on April 13, 1998. It is likely no coincidence that this action was filed less than thirty (30) days after the Court of Appeals' mandate in No. 97-2470 was docketed in IP 90-1373-C-M/F. O'Shell explains in her complaint that she brings this action:

for the continuing sex discrimination, harassment, maintenance of hostile and abusive working conditions and ongoing retaliation suffered by plaintiff prior to and at the time of her wrongful suspension in May 1991 and subsequent wrongful termination on January 10, 1992.

The defendants are (1) the United States of America, (2) the United States Department of Army, (3) the United States Army National Guard Bureau, (3) Hon. Robert M. Walker, Acting Secretary of the Army, (4) Major General William Navas, Director of the Army National Guard Bureau, (5) the State of Indiana, and (6) Indiana Governor O'Bannon.

O'Shell was employed as a full-time federal civil service career employee for twenty-six (26) years. From 1968 until January 10, 1992, she worked as a Financial Quality Assurance Analyst at the Army's USAFAC, located at FBH, Indiana. She states that during the last years of her employment, she experienced discrimination based on gender and also because she took part in appropriate procedures in an effort to correct the discrimination. Beginning in June 1987, she was repeatedly suspended for one to ten days without pay. These suspensions were later used for "discharge purpose[s]." O'Shell was initially discharged on June 3, 1988. She was reinstated after a hearing in October, 1988; however, two suspensions prior to the June termination were left on her record. It was based on those two suspensions, as well as issues dealing with compensation and career development opportunities, that O'Shell filed IP90-1373-C-M/F.

O'Shell was discharged for a second time on January 10, 1992. She contends that she was discharged that time because she filed five (5) Title VII/EEO formal complaints against her superiors, also because she served as a whistle blower in her federal auditor position, and because she assisted other federal

civilian employees as an employee representative. She claims to have been employed as both a civilian employee of the Army and a miliary employee of the United States Armed Forces, Guard and Reserve Components in a part-time position.

III. Discussion

A. Standard Under Rule 12(b)(6)

The defendants challenge the sufficiency of the complaint pursuant to Rule 12(b). The purpose of a motion to dismiss is to test the sufficiency of the complaint, not to decide its merits. *Gibson v. City of Chicago*, 910 F.2d 1510, 1520 (7th Cir. 1990), *cert. denied*, 502 U.S. 855 (1991). In making the assessment required by the motions to dismiss, the court liberally construes O'Shell's allegations and applies the principle that "a complaint must contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory. *Herdrich v. Pegram*, 1998 WL 483926, *3 (7th Cir. August 18, 1998) (citing *Sutliff, Inc. v. Donovan Cos., Inc.*, 727 F.2d 648, 654 (7th Cir. 1984)).[1] If a plaintiff pleads facts which show that she has no claim, then she has pleaded herself out of court. *Early v. Bankers Life & Casualty Co.*, 959 F.2d 75, 78 (7th Cir. 1992); *Conn v. GATX Terminals Corp.*, 18 F.3d 417, 419 (7th Cir. 1994). She is not saved by having pleaded a legal conclusion that if consistent with the facts would establish his right to relief, for he has shown that it is inconsistent with the facts. *Benson v. Cady*, 761 F.2d 335, 338 (7th Cir. 1985).

In *Iacampo v. Hasbro, Inc.*, 929 F.Supp. 562 (D.R.I. 1996),

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1 O'Shell differs from the typical *pro se* litigant because she is a licensed attorney. "While we treat *pro se* litigants gently, a *pro se* attorney is not entitled to special treatment." *Lockhart v. Sullivan*, 925 F.2d 214, 216 n.1 (7th Cir. 1991).

a federal district court cogently held that, "[l]ike a battlefield surgeon sorting the hopeful from the hopeless, a motion to dismiss invokes a form of legal triage, a paring of viable claims from those doomed by law." Id. At 567. *See also Guckenberger v. Boston University*, 957 F.Supp. 306, 313 (D.Mass. 1997). This technique is well-suited to O'Shell's action.

B. Analysis

O'Shell invokes a medley of statutes in support of her complaint: Title VII of the Civil Rights Acts of 1964, as amended, alleging discrimination based on gender; 42 U.S.C. § 1983, alleging violation of her rights arising from the First, Fifth, and Fourteenth Amendments and the Supremacy Clause of the United States Constitution; and 18 U.S.C. § 241 and 42 U.S.C. § 1985, alleging conspiracy to interfere with her civil rights. She also invokes federal and state Military Acts.

District courts have original jurisdiction over all civil actions arising under the laws of the United States, *see* 38 U.S.C. § 1331. Title VII is one such law, and among other purposes was designed to protect from discrimination "employees or applicants for employment . . . in military departments . . . ." 42 U.S.C. § 2000e-16(a). An aggrieved individual bring a civil action against the government pursuant to 42 U.S.C. § 2000e-16(c), which is also known as § 717(c) of the Civil Rights Act.

In amending Title VII to include federal employees, "Congress created 'an exclusive judicial remedy for claims of discrimination in federal employment.'" *Forest v. United States Postal Serv.*, 97 F.3d 137, 141 (6th Cir. 1996) (quoting *Brown v. General Servs. Admin.*, 425 U.S. 820, 835 (1976)). In *Brown*, 425 U.S. at 832, the Supreme Court expressed the view that:

The balance, completeness, and structural integrity of § 717 are

inconsistent with the ... contention that the judicial remedy afforded by § 717(c) was designed merely to supplement other putative judicial remedies.

The Court's discussion is based on its view that litigants might evade "the rigorous administrative exhaustion requirements and time limitations" of § 717 by recasting Title VII claims as claims under other statutes and so frustrate the legislative policies underlying Title VII. *Id.* At 833. This recasting of claims to invoke other remedial mechanisms is simply not permitted.

Based on the authoritative construction of § 717 in *Brown* and its progeny, therefore, O'Shell's claims of discrimination based on statutes other than 42 U.S.C. § 2000e-16(c) are dismissed for failure to state a claim upon which relief can be granted. *Ramey v. Bowsher*, 915 F.2d 731, 734 (D.C.Cir. 1990), *cert. denied*, 499 U.S. 947 (1991) (tort claim barred by the exclusivity of Title VII); *Castro v. United States*, 775 F.2d 399 (1st Cir. 1985) (§ 717 is exclusive judicial remedy for claims of discrimination in federal employment); *Day v. Wayne County Bd. of Auditors*, 749 F.2d 1199, 1204 (6th Cir. 1984) ("[A] federal employee claiming job discrimination may proceed only under Title VII, and may not secure additional remedies by proceeding also under [42 U.S.C.] § 1981."); *DiPompo v. West Point Military Academy*, 708 F.Supp. 540, 544 (S.D.N.Y. 1989) (dismissing 42 U.S.C. § 1985 claims as well as New York State statutory claims because of Title VII preemption); *Carver v. Casey*, 669 F.Supp. 412, 418-19 (S.D.Fla. 1987) (dismissing §§ 1983 and 1986 claims because of Title VII preemption); *Person v. United States Dept. of Agriculture*, 593 F.Supp. 1054, 1058-59 (E.D.Wis. 1984) (dismissing claims under 28 U.S.C. §§ 1331, 1343, 2201, and 2202 and Fifth Amendment of the United States Constitution because of Title VII preemption).

In her complaint, O'Shell freely admits that her claims are

wholly related to her alleged wrongful suspensions and termination, the last of which occurred in 1992. To the extent that O'Shell complains about the administrative and judicial proceedings derived from her 1990 law suit, those claims are also related to her miliary employment and the subsequent actions of her federal employer. As a result, O'Shell's discrimination-based claims pursuant to federal law other than Title VII cannot be maintained and must be dismissed.

Further, O'Shell names seven defendants in this action. Section 717(c) of Title VII directs that "the head of the department, agency, or unit, as appropriate, shall be the defendant." 42 U.S.C. § 2000e-16(c); *Blong v. Secretary of the Army*, 877 F.Supp. 1494, 1495 (D.Kan. 1995) (Secretary of the Army was the only proper defendant in a § 717 case brought by a civilian employee). Therefore, this court lacks subject matter jurisdiction over any of the defendants other than Robert Walker, Acting Secretary of the Army.[2] The statutory remedies available to O'Shell cannot be circumvented by suing individuals in tort. *Bush v. Lucas*, 462 U.S. 367, 390 (1983) (barring recovery against federal employee's supervisor for defamation).

The defendants assert that Title VII claim is untimely. Although O'Shell filed a number of administrative charges before and during the 1990 lawsuit, the most recent right to sue letter she

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[2]To the extent that O'Shell asserts a claim as a uniformed member of the armed forces as a member of the Indiana National Guard in a part-time position, her claim fails. Title VII does not apply to uniformed members of the armed forces. The term "military dependants" within the section proscribing discrimination against employees of such departments includes only civilian employees. *Knutson v. Wisconsin Air National Guard*, 995 F.2d 765 (7th Cir.), *cert. denied*, 510 U.S. 933 (1993); *Roper v. Department of the Army*, 832 F.2d 247 (2nd Cir. 1987).

alleges to have received was received in November 1992. The notice informed O'Shell that she had thirty (30) calendar days to file an appropriate civil action in federal court. *See Randle v. Bentsen.* 19 F.3d 371, 373 (7th Cir. 1994); 5 U.S.C. § 7703(b)(2).

It is quite apparent-apparent from the face of the complaint filed on April 13, 1998 - that O'Shell did not file this action within the 30-day period which pertained to the most recent of the right-to-sue letter. The timely filing of a Title VII action is a "condition precedent" to filing suit, and is subject to equitable modification. *Perkins v. Silverstein.* 939 F.2d 463, 470 (7th Cir. 1991); *see also Irwin v. Dep't of Veterans Affairs.* 498 U.S. 89, 95-96 (1990) ("the same rebuttal presumption of equitable tolling applicable to [Title VII] suits against private defendants should also apply to suits against the United States"). O'Shell's whistleblowing claim is likewise subject to a 30-day period of limitations for seeking judicial review. *See* 5 U.S.C. §§ 7702(a)(2), 7703(b)(2); *McAdams v. Reno.* 64 F.3d 1137, 1142 (8th Cir. 1995) ("Employees pursuing relief through an EEO mixed case complaint may file a civil discrimination action in federal district court within 30 days of a final decision by the agency . . . .").

The running of the statute of limitations is an appropriate ground for dismissal if it is apparent on the face of the complaint. *Rylewicz v. Beaton Serv.*, 698 F.Supp. 1391, 1398 (N.D.Ill. 1988); *see also Jablon v. Dean Witter & Co.*, 614 F.2d 677, 682 (9thCir. 1980). O'Shell argues vigorously that the present action was timely filed pursuant to both federal and state law.

Federal law is the proper source for determining whether the plaintiff's action has been timely brought. The Supreme Court held in the *Occidental Life Ins. Co. of California v. EEOC,* 432 U.S. 355 (1977), that it would be inconsistent with federal law to apply a state statute of limitations to actions instituted by the

EEOC under Title VII since the EEOC was "required by law to refrain from commencing a civil action until it ha[d] discharged its administrative duties." *Id.* At 368. There is no reason, in either legal or practical terms, to use any period of limitation other than that prescribed in Title VII itself to determine when suit had to be brought. *Lopez v. Louisiana Nat'l Guard*, 733 F.Supp. 1059 (E.D.La. 1990), *aff'd*, 917 F.2d 561 (5th Cir. 1990).

O'Shell seeks to avoid the straightforward computation of time with respect to the present claim by suggesting that the "involuntary dismissal without prejudice" of No. IP 90-1373-C-M/F on April 3, 1992, saved her cause for refiling at some future date. This tolling argument is without merit. Generally, a dismissal without prejudice leaves the situation the same as if the suit had never been brought. *Hilbun v. Goldberg*, 823 F.2d 881, 883 (5th Cir. 1987), *cert. denied*, 485 U.S. 962 (1988). As a result, where a case is dismissed, without prejudice, and the statute of limitations has run, the plaintiff is precluded from re-filing an action. *Petrucelli v. Excel Recycling & Manufacturing, Inc.*, 46 F.3d 1298, 1304 n.6 (3rd Cir. 1995).

Further, in the absence of a specific statute to the contrary, there is no tolling of the statute of limitation for the period of time during which the action so dismissed was pending. *Parker v. Marcotte*, 975 F.Supp. 1266 (C.D.Ca. 1997); *Wilson v. Grumman Ohio Corp.*, 815 F.2d 26 (6th Cir. 1987); *Bomer v. Ribicoff*, 304 F.2d 427 (6th Cir. 1962). Some courts have held specifically that a timely claim which is dismissed without prejudice for failure to prosecute does not toll the statute of limitations. *Dupree v. Jefferson*, 666 F.2d 606, 610-11 (D.C.Cir. 1981); *Stein v. Reynolds Securities, Inc.*, 667 F.2d 33, 34 (11th Cir. 1982); *Harris v. City of Canton, Ohio*, 725 F.2d 371, 376-77 (6th Cir. 1984). Other courts have merely assumed the same proposition, with which this court is in agreement. *Porter v. Beaumont Enterprise and Journal, Inc.*, 743 F.2d 269, 273 (5th

Cir. 1984); *Wei v. State of Hawaii*, 763 F.2d 370, 372 (9th Cir. 1985).

O'Shell's argument that the Indiana law controls the timing of the refiling of her claims would fare no better, even if the argument's premise was sound. In order to characterize this action as having been timely filed, O'Shell attempts to use the Indiana savings statute, Ind.Code 34-11-8-1 (1998), commonly known as the Journey Account Statute.[3] Under certain circumstances, this statute permits a plaintiff to reinstate a lawsuit which has suffered procedural default and have the lawsuit considered a continuation of the original action. *See, e.g.*,

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The Seventh Circuit provides an interesting history and rationale of Indiana's Journey's Account in *Morris v. Jenkins*, 819 F.2d 678 (7th Cir. 1987):

At common law, suits frequently failed a decision on their merits on account of some matter of form. In such cases, the plaintiff was permitted, within a reasonable time, to sue out a new writ, and such renewal suit was deemed a continuation of the first. The time which was reasonable for such purpose was computed theoretically with reference to the number of days required for plaintiff to journey to the place where the court was held, and hence the name "Journey's Account." (citations omitted). This ancient remedy is not now recognized in this country, but, in lieu thereof, statutes have been passed in nearly all of the states, providing for a renewal of actions which have failed on account of some matter not involving the merits. These statutes do not contemplate a renewal or continuance of the former suit as at common law under Journey's Account, but that a new and distinct suit shall be commenced, which shall be treated as a continuation of such former suit.

Id. at 679 n.2 (citations omitted)(quoting Pennsylvania Co. v. Good, 103 N.E. 672, 673 (1913)).

Mayfield v. Continental Rehabilitation Hosp. Of Terre Haute. 690 N.E.2d 738, 741 (Ind.App. 1998); *Eves v. Ford Motor Co.*, 152 Ind.App. 34, 42-43, 281 N.E.2d 826, 831 (1972) (statute saves claim brought in state court after expiration of original statute of limitations when brought within 5 years after same action abated by federal district court for jurisdictional reasons); *Abele v. A.L. Dougherty Overseas. Inc.*, 192 F.Supp. 955, 956-57 (N.D.Ind. 1961) (statute saves employment action brought in state court after expiration of original statute of limitations when brought within 5 years after identical claim dismissed without prejudice by federal district court). However, an action may be saved "if a plaintiff commences an action and the plaintiff fails in the action from any cause except: (1) negligence in the prosecution of the action . . . a new action may be brought not later than . . . three (3) years after the date of the determination under subsection (a) . . . and be considered a continuation of the original action commenced by the plaintiff." IND. CODE § 34-11-8-1. As already noted, No. IP 90-1373-C-M/F was dismissed on April 3, 1992, based on O'Shell's failure to prosecute. Although O'Shell filed post-judgment motions and an appeal, those proceedings were not commenced for ten months after the original action was dismissed. Considering this history, it must be concluded that neither the letter nor the spirit of Indiana's Journey Account Statute can rescue the plaintiff's present action from dismissal.[4]

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[4] In her argument, O'Shell argues that her claim is saved under an older and now repealed version of this statute. Ind.Code § 34-1-2-8. The Indiana case law which interpreted that statute held that, despite statutory language to the contrary, a claim which could be reinstated under the previous version of the Journey Account Statute would not be defeated by negligence in the prosecution. *Vesolowski v. Repay*, 520 N.E.2d 433, 435-36 (Ind. 1988). Interestingly, negligence in prosecution is the very reason that

(continued...)

IV. Conclusion

The plaintiff's federal claims are either not cognizable at all or barred by the applicable period of limitations within which such claims had to be brought. With respect to the issue of timeliness, the parties should recognize that "[s]tatutes of limitations . . . represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Railroad Tel. v. Railway Express Agency*, 321 U.S. 342, 349, 64 S. Ct. 582, 586 (1944). Whether considered as the attempted continuation of *O'Shell v. Department of the Air Force*, IP 90-1373-C-M/F (S.D.Ind. April 3, 1992), or as asserting new claims, or both, the plaintiff's federal claims are time-barred. Accordingly, the defendants' motions to dismiss are **granted**. To the extent that O'Shell asserts pendent state law claims, the exercise of supplemental jurisdiction such claims is inappropriate where the federal claims have been dismissed, and the state law claims are therefore dismissed for lack of jurisdiction. 28 U.S.C. § 1367(c).

Judgment consistent with the Entry shall now enter. The conference set for October 14, 1998, is **vacated**.

IT IS SO ORDERED.

/s/ John D. Tinder
JOHN D. TINDER, Judge
United States District Court

Date: 9/28/98

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[4](...continued)
O'Shell's 1990 suit was dismissed. In any event, in 1993, the Indiana legislature amended the Journey Account Statute to clarify that it would not save an action which had failed due to negligence in the prosecution. P.L. 239-1993.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

July 9, 1999

Hon. WILLIAM J. BAUER, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge
Hon. DANIEL A. MANION, Circuit Judge

GLORIA K. O'SHELL, Plaintiff-Appellant,	]	Appeal from the United States District Court for the Southern
No. 98-3750 v.	]	District
UNITED STATES OF AMERICA, ROBERT M. WALKER, Acting Secretary of the Army; MAJOR GENERAL WILLIAM NAVAS, JR., Director, Army National Guard Bureau; et al., Defendants-Appellees.	]	of Indiana, Indianapolis Division. No. IP 98-0494-C-T/C John D. Tinder, Judge.

ORDER

On consideration of the petition for rehearing filed in the above-entitled case on May 14, 1999, by plaintiff-appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby DENIED.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

(Submitted December 17, 1997*)

UNPUBLISHED ORDER NOT TO BE CITED PER CIRCUIT RULE 53

Before

Hon. **JOEL M. FLAUM,** *Circuit Judge*
Hon. **KENNETH F. RIPPLE,** *Circuit Judge*
Hon. **DIANE P. WOOD,** *Circuit Judge*

GLORIA K. O'SHELL *Plaintiff-Appellant.*	]	Appeal from the United States District Court for
No. 97-2470 v.	]	the Southern District of
UNITED STATES DEPARTMENT OF THE AIR FORCE, et al., *Defendants-Appellees.*	]	Indiana, Indianapolis Division.
	]	No. 90 C 1373
	]	**Larry J. McKinney,** *Judge.*

ORDER

On May 17, 1990, Gloria K. O'Shell commenced an action

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*After an examination of the briefs and the record, we have concluded that oral argument is unnecessary, and the appeal is submitted on the briefs and the record. *See* Fed. R. App. P. 34(a); Cir. R. 34(f).

alleging that a number of defendants, all of whom bear some connection to the United States Army,[1] discriminated against her on the basis of her gender. On April 3, 1992, the district court dismissed O'Shell's case without prejudice for failure to prosecute, pursuant to Rule 41(b) of the Federal Rules of Civil Procedure. Ten months later, O'Shell filed numerous motions, including a motion for relief from the district court's order of dismissal, which the district court construed as a motion pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. The district court denied O'Shell's Rule 60(b) motion and she appeals. We affirm.

The district court dismissed O'Shell's case for failure to prosecute because she exhibited a pattern of failing to comply with district court deadlines. O'Shell failed to meet filing deadlines, failed to attend a pre-trial conference, and did not respond to an Order to Show Cause, which gave her 30 days to explain why her action should not be dismissed. Prior to the dismissal, the district court issued two orders warning explicitly that if she failed to respond to the court's orders her case might be dismissed with prejudice.[2] After O'Shell failed to respond to the

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[1] She included claims against the Departments of the Army and Air Force, the National Guard Bureau, the United States Army Finance and Accounting Center, the United States Army Civilian Appellate Review Agency, and fifteen individual defendants. Pursuant to a motion by the defendants, the district court dismissed all of the claims against all of the defendants expect O'Shell's claim against the Secretary of the Army under Title VII of the Civil Rights Act of 1964.

[2] Although O'Shell was represented by counsel at the time of the first order, her counsel had filed a motion to withdraw. The court granted counsel's motion to withdraw shortly after the issuance of

(continued...)

Order to Show Cause, the district court dismissed her case without prejudice.

The district court explained that it denied O'Shell's Rule 60(b) motion for relief from judgment because she had failed to satisfy any of the criteria identified in the rule. Rule 60(b) permits a party to seek relief from a final judgment on the grounds of mistake, inadvertence, excusable neglect, newly discovered evidence, fraud, or other justifying reason.

"A trial court's decision to deny Rule 60(b) relief 'is entitled to great deference,' and is reviewed under the abuse of discretion standard." *Robb v. Norfolk & Western Ry. Co.*, 122 F.3d 354, 357 (7th Cir. 1997) (quoting *Tobel v. City of Hammond*, 94 F.3d 360, 362 (7th Cir. 1996)). "We will find that a district court has abused its discretion only if no reasonable person could agree with the district court." *Tobel*, 94 F.3d at 362. "Because we are limited to the question of whether a district court's Rule 60(b) determination involved an abuse of discretion, we do not review the merits of the underlying judgment, and our review is far narrower than it would be on direct appeal." *Provident Sav. Bank v. Popovich*, 71 F.3d 696, 698 (7th Cir. 1995). "Relief under Rule 60(b) 'is an extraordinary remedy and is granted only in exceptional circumstances.'" *United States v. 8136 S. Dobston Street*, 125 F.3d 1076, 1082 (7th Cir. 1997) (quoting *Dickerson v. Board of Educ.*, 32 F.3d 1114, 1116 (7th Cir. 1994) (citations and internal quotations omitted)). O'Shell asserts that she was entitled to relief under Rule 60(b) because of excusable neglect,

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[2](...continued)
the first warning. The withdrawal of counsel did not excuse O'Shell's failure to meet or respond to the district court's deadlines because both orders were served upon O'Shell and set deadlines after the date of counsel's withdrawal. Moreover, O'Shell was a licensed attorney at that time.

misconduct on the part of her former attorney and the United States Attorney representing the defendants, and the district court's failure to treat her like a typical pro se litigant.

O'Shell argues that she could not meet the district court's deadlines because her time was consumed by the administrative proceedings that the defendants had commenced against her in relation to her numerous claims of discrimination. She also states that she lacked adequate time to respond to the deadlines because she was experiencing stress from the loss of her job, withdrawal of her attorney, and search for new employment. Additionally, O'Shell asserts that she did not respond to the Order to Show Cause because the notice of the order sent to her got mixed up with one of her tenant's junk mail.

If O'Shell faced pressing deadlines in the administrative proceedings against her, she could have informed the district court of these proceedings and requested an extension or formal stay until the conclusion of the administrative proceedings. O'Shell made no such request to the district court. O'Shell's decision to forgo compliance with the district court's deadlines while she dealt with the administrative proceedings does not rise to an "exceptional circumstance" that requires reversal of the district court's denial of her Rule 60(b) motion. "[W]here a party willfully, albeit through ignorance or carelessness, abdicates its responsibilities, relief from judgment under Rule 60(b) is not warranted." *Zuelzke Tool & Engineering Co., Inc. v. Anderson Die Castings, Inc.*, 925 F.2d 226, 229 (7th Cir. 1991).

O'Shell next argues that defense counsel and her attorney committed misconduct in violation of Indiana's Rules of Professional Conduct by failing to inform the district court judge of the pending administrative proceedings. The argument is unconvincing. "[T]he pro se status of an opponent does not impose any special duty on a litigant." *Provident Sav. Bank*, 71

F.3d at 699. It was O'Shell who bore the burden of informing the district court why she could not comply with the deadlines. O'Shell also asserts that the defendants' purpose in commencing additional administrative proceedings against her was to obstruct her from meeting the district court's deadlines. However, O'Shell fails to identify any facts that support her claim that the defendants acted unlawfully in filing administrative proceedings.

In an attempt to support her assertion that the district court abused its discretion in denying her Rule 60(b) motion. O'Shell states that the district court improperly recognized that she was a licensed attorney and treated her differently than a typical pro se litigant. This argument is unavailing because we have noted that "[w]hile we treat pro se litigants gently, a pro se attorney is not entitled to special treatment." *Lockhart v. Sullivan*, 925 F.2d 214, 216 n.1 (7th Cir. 1991).

O'Shell raises for the first time in this appeal that she is entitled to relief because the district court dismissed her underlying claim "without prejudice" This issue is waived as it was not presented to the district court. *Oates v. Discovery Zone*, 116 F.3d 1161, 1168 (7th Cir. 1997); *Beshear v. Weinzapfel*, 474 F.2d 127, 133 (7th Cir. 1973). Additionally, O'Shell raises several issues that relate to the dismissal of her cause of action; however, on review of the denial of a Rule 60(b) motion we do not review the merits of the underlying claim. *Provident Sav. Bank*, 71 F.3d at 698. Lastly, O'Shell's argument that the district court improperly denied her request to amend or supplement her claims with a 118 page "Supplemental Verified Amended Complaint" is without merit. *Viacom, Inc. v. Harbridge Merchant Services, Inc.*, 20 F.3d 771, 784-85 (7th Cir. 1994) (a plaintiff generally must succeed in setting aside the judgment before seeking leave to amend the complaint).

O'Shell failed to demonstrate an "exceptional circumstance"

that would entitle her to relief from the district court's judgment. Therefore, the district court did not abuse its discretion in denying her Rule 60(b) motion.

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

GLORIA K. O'SHELL,	)	
Plaintiff,	)	
	)	
v.	)	CAUSE NO IP 90-1373 C
	)	M/F
	)	
TOGO D. WEST, JR.,	)	
SECRETARY OF THE ARMY,)		
UNITED STATES	)	
DEPARTMENT OF THE	)	
ARMY,[1]	)	
Defendant.	)	

ORDER ON PLAINTIFF'S MOTION FOR RELIEF FROM JUDGMENT

In the instant case, Plaintiff Gloria K. O'Shell alleged that a large group of defendants, all of whom bear some connection to the United States Army, discriminated against her on the basis of her gender. O'Shell filed her initial complaint on May 17, 1990, but this Court dismissed the matter on April 3, 1992, based upon O'Shell's failure to prosecute her claim. Ten months later, O'Shell filed numerous motions, including a motion for relief from this Court's order of dismissal, which this Court has treated as a motion under Rule 60(b) of the Federal Rules of Civil Procedure. Three years passed before these motions received the consideration of this Court, and all the motions aside from the

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Togo D. West, Jr., the current Secretary of the Army, has been automatically substituted as the proper defendant to this action pursuant to Rule 25(d) of the Federal Rules of Civil Procedure.

60(b) motion have been denied. On October 4, 1996, this Court directed the parties to complete an additional round of briefing pertaining to the pending 60(b) motion, and the parties have complied with this order. Upon review of these briefs and the materials incorporated by reference, this Court now **DENIES** O'Shell's motion for relief from the dismissal order.

To place the present 60(b) motion in context requires a review of the events leading up to this Court's dismissal of the action - - as well as other, more recent, events. When O'Shell initially filed this action on May 17, 1990, she included claims against the Departments of the Army and Air Force, the National Guard Bureau, the United States Army Finance and Accounting Center, the United States Army Civilian Appellate Review Agency, and fifteen individual defendants. Only July 25, 1990, the defendants moved for dismissal of all of the claims against all of the defendants aside from O'Shell's claim against the Secretary of the Army ("Secretary") under Title VII of the Civil Rights Act of 1964. In an order dated September 24, 1990, this Court granted the defendants' motion and dismissed all of the defendants except for the Secretary and all of the claims except for the Title VII claim.

On October 19, 1990, the Secretary filed a motion to dismiss under Rule 8 of the Federal Rules of Civil Procedure. According to the Secretary, the thirty-one page complaint violated the Rule's requirement that a pleading should include "a short and plain statement of the claim . . . ." Fed R. Civ. P.8(a). In an order dated July 31, 1991, this Court agreed that the plaintiff's allegations were "confusing and at times rambling" but declined to dismiss the action. Instead, this Court directed O'Shell to file an amended complaint in compliance with Rule 8(a). O'Shell complied with this order and filed an amended complaint on August 13, 1991.

On September 23, 1991, this Court issued a pretrial scheduling order which established deadlines for filing of contentions and discovery matter. Of particular relevance, this order directed O'Shell to file her contentions "on or before January 3, 1992 . . . ." On January 13, 1992, James Kelly, O'Shell's attorney, filed a motion to withdraw as counsel of record. While this motion was still pending, this Court issued an order, dated February 19, 1992, noting that O'Shell had failed to file her contentions in a timely fashion. This order then directed O'Shell to file her contentions by March 13, 1992. The order also stated: "Should the plaintiff fail to respond to this Order of the Court, this matter may be dismissed with prejudice." In addition, this order scheduled a pretrial conference for February 28, 1992. The order was served upon O'Shell and counsel for the United States. In a separate order bearing the same date, this Court granted Kelly's motion to withdraw as plaintiff's counsel. This order was also served upon O'Shell and counsel for the United States.

On February 28, 1992, counsel for the United States attended the pretrial conference, but O'Shell did not. That same date, this Court issued an order to show cause, which gave O'Shell thirty days to inform the Court why her cause of action should not be dismissed. This order specifically stated that a failure to show good cause would result in dismissal of her claims. Because O'Shell did not respond to the order to show cause, this Court issued an order on April 3, 1992, dismissing her cause of action pursuant to Federal Rule 41(b) based upon her failure to prosecute her claims.

Ten months later, on February 8, 1993, O'Shell filed her own appearance in this action[2] along with several other motions -

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(continued...)

- including a "Verified Motion for Relief from 3 April 1992 Order of Dismissal without Prejudice" ("Motion for Relief"). O'Shell also filed a motion to supplement and amend her complaint - - as well as a 131-page amended complaint. Through this amended, O'Shell sought to state claims against forty-one different defendants, including several whom this Court had previously dismissed from the action. In an entry dated October 4, 1996 ("October Order"), this Court denied most of O'Shell's pending motions. Rather than simply reject O'Shell's Motion for Relief out of hand, however, this Court indicated that the motion would be treated as having been filed under Rule 60(b) of the Federal Rules of Civil Procedure. The October Order then directed the parties to submit an additional round of briefs addressing whether O'Shell had a "meritorious claim or defense" under Title VII. To be more specific, the Secretary had previously filed a brief pertaining to certain 12(b) defenses; in this brief, the Secretary argued that O'Shell had failed to file a timely charge of discrimination with the Equal Employment Opportunity Commission. The October Order instructed the parties to further develop this issue "for the purpose of determining whether the plaintiff has a meritorious claim which can be adjudicated, even if a further basis for granting Rule 60(b) relief can be found." Both parties have submitted briefs as ordered.

Although the October Order directed the parties to focus their attentions upon whether O'Shell filed a timely EEOC charge, this Court now considers it more appropriate to being the inquiry by examining whether O'Shell's Motion for Relief meets the requirements of Rule 60(b). The Federal Rules enumerate

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[2](...continued)
O'Shell differs from the more typical pro se litigant in that she is a licensed attorney. "While we treat pro se litigants gently, a pro se attorney is not entitled to special treatment." Lockhart v. Sullivan, 925 F.2d 214, 216 n.1 (7th Cir. 1991).

several instances under which a party may seek and obtain relief from a court's judgment. As one example, a court may "grant relief from a judgment under the particular circumstances listed" in Rule 60(b). Russell v. Delco Remy Div. Of General Motors Corp., 51 F.3d 746, 749 (7th Cir. 1995). In relevant part, this rules states:

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence would not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) and other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

Fed. R. Civ. P. 60(b). In addition, it is important to note that "[r]elief under Rule 60(b) is an extraordinary remedy that is to be granted only in exceptional circumstances." Provident Sav. Bank v. Popovich, 71 F.3d 696, 698 (7th Cir. 1995); Russell, 51 F.3d at 749. "[W]here a party willfully, albeit through ignorance or carelessness, abdicates its responsibilities, relief from judgment under Rule 60(b) is not warranted." Zuelzke Tool & Eng'g Co. v. Anderson Die Castings, Inc., 925 F.2d 226, 228 (7th Cir. 1991). The decision of whether to grant or deny a Rule 60(b)

motion is "committed to the district court's sound discretion." Russell, 51 F.3d at 749.

O'Shell's Motion for Relief does not satisfy any of the criteria identified by Rule 60(b). This Court dismissed O'Shell's cause of action because she failed to meet the deadlines established in the pretrial scheduling order, because she failed to appear for a pretrial conference, and because she failed to respond to an order of this Court which gave her thirty days to explain why her cause of action should be dismissed. The Motion for Relief does not attempt to attribute these failures to "mistake, inadvertence, surprise, or excusable neglect," so Rule 60(b)(1) does not apply. Similarly, O'Shell has not identified any "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)," so Rule 60(b)(1) offers her no assistance.[3]

Rule 60(b)(3) allows a party to seek relief from a final judgment based upon "fraud . . . misrepresentation, or other misconduct of an adverse party . . . ." In the Motion for Relief, O'Shell asserts that the defendant "unlawfully and intentionally obstructed" her from complying with the pretrial scheduling order by filing additional proceedings against her. Moreover, she asserts that the defendants' attorney "unethically and improperly

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[3] The Motion for Relief does incorporate by reference O'Shell's second amended complaint, which offers extensive factual discussion of O'Shell's claims. However, O'Shell does not indicate in her Motion for Relief that this complaint contains any facts which could not have been discovered in time to file a Rule 59(e) motion. More importantly, the second amended complaint has itself been stricken from the record. To allow O'Shell to obtain relief from judgment by relying upon facts contained in a document which has already been explicitly excluded from any subsequent proceeding would make little sense.

acted to take advantage" of her "'unrepresented status.'" Under the circumstances, this Court does not believe these allegations support the "extraordinary remedy" of Rule 60(b) relief. First, O'Shell has not identified any facts to support her claim that the defendants acted unlawfully in filing the additional proceedings. Second, it is inappropriate for O'Shell to claim that the defendants took advantage of her unrepresented status. This Court's order warned that dismissal would result if she did not show good cause; as an attorney herself, O'Shell should have known she could only avoid that result by filing some sort of response.

Third, and most importantly, O'Shell has never fully explained why she failed to meet the deadlines established by the pretrial scheduling order and the order of February 28, 1992. If she faced pressing deadlines in the separate proceedings against her, she could have informed this Court of that fact. She could have also requested a formal stay of this action pending resolution of the administrative proceedings. To have notified this Court of the additional proceedings would have likely satisfied this Court's request for her to show good cause why her action should not be dismissed. O'Shell did not exercise any of these options. Stated simply, O'Shell has requested relief from judgment based upon actions which occurred before this Court entered that judgment. If she would have notified the Court of her inability to respond to the prior orders, then her action would not have been dismissed in the first place. These circumstances do no warrant Rule 60(b) relief.

The two remaining specific criteria of Rule 60(b) are equally unavailing to O'Shell. Nothing suggests that the prior judgment is void, so Rule 60(b)(4) does not apply. Similarly, Rule 60(b)(5) is inapplicable because there is no indication that "the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective

application . . . ."

The Rule contains a catch-all provision, which allows a court to grant a 60(b) motion based upon "any other reason justifying relief from the operation of the judgment." Fed. R. Civ. P. 60(b)(6). This provision could encompass O'Shell's argument that defense counsel and her attorney had a duty to inform this Court of the additional proceedings against her. However, this argument lacks credence. O'Shell has identified no legal authority suggesting that either the United States Attorney or her attorney - - who withdrew as her representative before this Court asked her to give good cause why her action should be dismissed - - bore any duty to notify this Court of separate administrative proceedings. Ultimately, this Court believes that duty fell upon O'Shell's own shoulders. Once again, if she would have notified this Court of her difficulty meeting the pretrial deadlines, this Court could have rescheduled those deadlines or stayed the proceeding. O'Shell may not use a 60(b) motion to obtain relief from a dismissal which she could have avoided by paying diligent attention to the action she had filed.

In conclusion, this Court would emphasize that Rule 60(b) "was intended to address mistakes attributable to special circumstances . . . ." Russell, 51 F.3d at 749. No special circumstances exist in the present case. If O'Shell would have notified this Court of the additional proceedings against her, this Court could have given her additional time or entered a stay. Under the circumstances, Rule 60(b) relief would be inappropriate. Therefore, this Court now **DENIES** O'Shell's Motion for Relief. The order of dismissal shall remain in effect as previously entered.

IT IS SO ORDERED THIS 16th day of April, 1997.

/s/ Larry J. McKinney

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Dated March 9, 1998

Before

Hon. **JOEL M. FLAUM,** *Circuit Judge*
Hon. **KENNETH F. RIPPLE,** *Circuit Judge*
Hon. **DIANE P. WOOD,** *Circuit Judge*

GLORIA K. O'SHELL, *Plaintiff-Appellant.*	]	Appeal from the United States District Court for
No. 97-2470 v.	]	the Southern District of
UNITED STATES DEPARTMENT OF THE AIR FORCE, et al., *Defendants-Appellees.*	]	Indiana, Indianapolis Division.
	]	No. 90 C 1373
	]	**Larry J. McKinney,** *Judge.*

ORDER

On consideration of the petition for rehearing filed by plaintiff-appellant on February 23, 1998, all members of the panel have voted to **DENY** the petition. Accordingly,

IT IS ORDERED that the petition for rehearing be, and the same is hereby, **DENIED**.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

GLORIA K. O'SHELL, Plaintiff,
v.
MICHAEL P.W. STONE, Secretary of the Army, Defendant.

) CAUSE NO. IP 90-1373-C

ORDER OF DISMISSAL

The plaintiff having failed to show cause why this cause should not be dismissed for failure to prosecute, pursuant to Rule 41(b) of the Federal Rules of Civil Procedure, this cause is now ORDERED DISMISSED WITHOUT PREJUDICE.

IT IS SO ORDERED this 3rd day of April, 1992.

/s/ Larry J. McKinney
LARRY J. McKINNEY, JUDGE
United States District Court
Southern District of Indiana

United States Constitution

Article 2 § 2 — U.S. Constitution

"[1] The President shall be commander in chief of the Army and Navy of the United States, and of the militia of the several states, when called into the actual service of the United States . . ."

Article 4 § 1 — U.S. Constitution

"Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state. And the congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

Amendment 2 — U.S. Constitution

"A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed."

Amendment 14 — U.S. Constitution

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Indiana Constitution

Article 1 § 12

"All courts shall be open; and every person for injury done to him in his person, property or reputation shall have remedy by due course of law. Justice shall be administered freely, and without purchase, completely, and without denial; speedily and without

delay."

Article 1 § 23

"The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, open the same terms, shall not equally belong to all citizens."

Article 1 § 24

"No ex post facto law, or law impairing the obligation of contracts, shall ever be passed."

Article 1 § 33

"The military shall be kept in strict subordination to the civil power."

Article 4 § 23

"In all cases enumerated in the preceding Section [§ 22; Local or special laws forbidden], and in all other cases where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the State."

Article 4 § 27

"Every statute shall be a public law, unless otherwise declared in the statute itself."

Article 5 § 12

"The Governor shall be commander-in-chief of the armed forces, and may call out such forces, to execute the laws or to suppress insurrection, or to repel invasion."

Article 12 § 1 & § 2

§ 1 "A militia shall be provided . . . (and) may be divided into active and inactive classes and consist of such military organizations as may be provided by law."

§ 2 "The Governor is Commander-in-Chief of the militia and other military forces of this state."

Article 15 § 1

"All officers, whose appointment is not otherwise provided for in this Constitution, shall be chosen in such manner as now is, or hereafter may be, prescribed by law."

Article 15 § 4

"Every person elected or appointed to any office under this constitution, shall, before entering on the duties thereof, take an oath or affirmation to support the Constitution of this State and of the United States, and also an oath of office."

5 U.S.C.

§ 2301. Merit system principles

(a) This section shall apply to -

(1) an Executive Agency; and

. . . .

(b) Federal personnel management should be implemented consistent with the following merit system principles:

. . . .

(2) All employees . . . should receive fair and equitable treatment in all aspects of personnel management without regard to political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping condition, and with proper regard for their privacy and constitutional rights.

. . . .

(9) Employees should be protected against reprisal for the lawful disclosure of information which the employees reasonably believe evidences --

(A) a violation of any law, rule or regulation, or

. . . .

5 U.S.C.

§ 2302. Prohibited personnel practices

(a)(1) For the purpose of this title, "prohibited personnel practice" means any action described in subsection (b) of this section.

(2) For the purpose of this section --

(A) "personnel action" means --

. . . .

(iii) an action under chapter 75 of this title or other disciplinary or corrective action;

. . . .

(B) "covered position" means, with respect to any personnel action, any position in the competitive service . . .

. . . .

(C) "agency means and Executive agency . . .

. . . .

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority --

(1) discriminate for or against any employee or applicant for employment --

(A) on the basis of race, color religion, sex or national origin, as prohibited under section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16);

. . . .

(9) take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of --

(A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation;

(B) testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in subparagraph (A);

. . . .

(D) for refusing to obey an order that would require the individual to violate a law;

(10) discriminate for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others . . . .

(11) take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this title.

. . . .

(c) The head of each agency shall be responsible for the prevention of prohibited personnel practices, for the compliance with and enforcement of applicable civil service laws, rules, and regulations, and other aspects of personnel management, and for ensuring (in consultation with the Office of Special Counsel) that agency employees are informed of the rights and remedies available to them under this chapter and chapter 12 of this title. Any individual to whom the head of an agency delegates authority for personnel management, or for any aspect thereof, shall be similarly responsible within the limits of the delegation.

(d) This section shall not be construed to extinguish or lessen any effort to achieve equal employment opportunity through affirmative action or any right or remedy available to any employee or applicant for employment in the civil service under --

(1) section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), prohibiting discrimination on the basis of race, color, religion, sex, or national origin;

. . . .

5 U.S.C.

§ 7513. Cause and procedure

(a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.

. . . .

(d) An employee against whom an action is taken under this

section is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title.

. . . .

5 U.S.C.

§ 7701. Appellate procedures

(a) An employee . . . may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. An appellant shall have the right . . . .

. . . .

(c)(2) Notwithstanding paragraph (1), the agency's decision may not be sustained under subsection (b) of this section if the employee . . . .

. . . .

(B) shows that the decision was based on any prohibited personnel practice described in section 2302(b) of this title; or

(C) shows that the decision was not in accordance with law.

. . . .

5 U.S.C.

§ 7702. Actions involving discrimination

(a)(1) Notwithstanding any other provision of law, and except as provided in paragraph (2) of this subsection, in the case of any employee . . . who --

(A) has been affected by an action which the employee or applicant may appeal to the Merit Systems Protection Board, and

(B) alleges that a basis for the action was discrimination prohibited by --

(i) section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16

. . . .

the Board shall, within 120 days of the filing of the appeal, decide both the issue of discrimination and the appealable action in

accordance with the Board's appellate procedures under section 7701 of this title and this section.

. . . .

(3) Any decision of the Board under paragraph (1) of this subsection shall be a judicially reviewable action as of --

(A) the date of issuance of the decision if the employee or applicant does not file a petition with the Equal Employment Opportunity Commission under subsection (b)(1) of this section, or

(B) the date the Commission determines not to consider the decision under subsection (b)(2) of this section.

(b)(1) An employee or applicant may, within 30 days after notice of the decision of the Board under subsection (a)(1) of this section, petition the Commission to consider the decision.

(2) The Commission shall, within 30 days after the date of the petition, determine whether to consider the decision. A determination of the Commission not to consider the decision may not be used as evidence with respect to any issue of discrimination in any judicial proceeding concerning that issue.

. . . .

(e)(1) Notwithstanding any other provision of law, if at any time after -

(A) the 120th day following the filing of any matter described in subsection (a)(2) of this section with an agency, there is no judicially reviewable action under this section or an appeal under paragraph (2) of this subsection;

(B) the 120th day following the filing of an appeal with the Board under subsection (a)(1) of this section, there is no judicially reviewable action (unless such action is not as the result of the filing of a petition by the employee under subsection (b)(1) of this section; or

(C) the 180th day following the filing of a petition with the Equal Employment Opportunity Commission under subsection (b)(1) of this section, there is no final agency action under subsection (b), (c), or (d) of this section;

an employee shall be entitled to file a civil action to the same extent and in the same manner as provided in section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(c)) . . . .

(2) If, at any time after the 120th day following the filing of any matter described in subsection (a)(2) of this section with an agency, there is no judicially reviewable action, the employee may appeal the matter to the Board under subsection (a)(1) of this section.

(3) Nothing in this section shall be construed to affect the right to trial de novo under any provision of law described in subsection (a)(1) of this section after a judicially reviewable action, including the decision of an agency under subsection (a)(2) of this section.

. . . .

5 U.S.C.

§ 7703. Judicial review of decisions of the Merit Systems Protection Board

(2) Cases of discrimination subject to the provisions of section 7702 of this title shall be filed under section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(c)) . . . . Notwithstanding any other provision of law, any such case filed under any such section must be filed within 30 days after the date the individual filing the case received notice of the judicially reviewable action under such section 7702.

. . . .

(c). . . except that in the case of discrimination brought under any section referred to in subsection (b)(2) of this section, the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court.

. . . .

42 U.S.C

§ 1981a. Damages in cases of intentional discrimination in employment.

(a) Right of recovery

(1) Civil rights

In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5) [42 U.S.C.A. §§ 2000e-5 or 2000e-16] against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act (42 U.S.C. 2000e-2 or 2000e-3) [42 U.S.C.A. §§ 2000e-2, 2000e-3, or 2000e-16], and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000e-5(g)], from the respondent.

. . . .

(b) Compensatory and punitive damages

(1) Determination of punitive damages.

A complaining party may recover punitive damages under this section against a respondent (other than a government, governmental agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

. . . .

(c) Jury trial

If a complaining party seeks compensatory or punitive damages under this section --

(1) any party may demand a trial by jury; and

. . . .

(2) Discriminatory practice

The term "discriminatory practice" means the discrimination described in paragraph (1) . . . of subsection (a) of this section.

42 U.S.C.

§ 1985. Conspiracy to interfere with civil rights

. . . .

(3) Depriving persons of rights or privileges

If two or more persons in any state or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws . . . in any case of conspiracy set forth in this section, if one or more person engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is incurred in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C.

§ 1986. Action for neglect to prevent

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence

could have prevented; and such damages may be recovered in an action on the case; and any number of person guilty of such wrongful neglect or refusal may be joined by defendants in the action . . . .

42 U.S.C.

§ 2000e-3. Other unlawful employment practices

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings.

It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

. . . .

42 U.S.C.

§ 2000e-16. Employment by Federal Government

(a) Discriminatory practices prohibited; employees or applicants for employment subject to coverage

All personnel actions affecting employees . . . in military departments as defined in section 102 of Title 5 . . . shall be made free from any discrimination based on race, color, religion, sex , or national origin.

. . . .

(c) Civil action by employee . . . for redress of grievances; time for bringing of action; head of department, agency, or unit as defendant

Within 90 days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin brought pursuant to subsection (a) of this section, Executive Order 11478 or any

succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit an employee . . . if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

(d) Section 2000e-5(f) through (k) of this title applicable to civil actions

The provisions of section 2000e-5(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder, and the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties.[1]

(e) Governmental agency or official not relieved of responsibility to assure nondiscrimination in employment or equal employment opportunity.

Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.

28 U.S.C.

§ 1652. State laws as rules of decision

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil

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So in original.

actions in the courts of the United States, in cases where they apply.

Ind. Code
34-1-2-8 New actions; continuation of action

Sec. 8. If, after the commencement of an action, the plaintiff fails therein, from any cause except negligence in the prosecution, or the action abate, or be defeated by the death of a party, or judgment be arrested or reversed on appeal, a new action may be brought within five (5) years after such determination, and be deemed a continuation of the first, for the purposes herein contemplated.

Ind. Code
34-1-2-2 General Limitations

Sec. 2. The following actions shall be commenced within the period herein prescribed after the cause of action has accrued, and not afterwards:

. . . .

(6) Upon contracts in writing other than those for the payment of money . . . within ten (10) years. However, upon contracts in writing other than those for the payment of money entered into before September 1, 1982 . . . action must be commenced within twenty (20) years.

Ind. Code
10-2-1-1. Short title. — This article shall be known and may be cited as the Indiana Military Code.

Ind. Code
10-2-1-2. Definitions . . . .

. . . .

"Federally recognized national guard" denotes that portion of the Indiana national guard which has met all the requirements for, and has been recognized by, the national military establishment as

a part of the reserve components of the armed forces of the United States . . .

. . . .

"National Guard" may apply to the national guard of Indiana or the national guard of the United States according to the tenor of the appropriate section.

"Officer" shall mean commissioned officer, including warrant officer, in the armed forces of the state of Indiana.

. . . .

Ind. Code

10-2-3-4 National guard; officers; eligibility

Sec. 4. All officers shall be commissioned by the governor, who shall be and is, ex officio, the commander in chief, and no person shall be commissioned in the national guard of this state, unless that person is a citizen of the state. No commission shall be issued to any officer of the national guard except to general officers until such officer shall have passed a satisfactory examination before a board as to the officer's knowledge of military affairs proportionate to the office to be held and the officer's general knowledge and fitness of the service. No person shall be eligible for appointment to the office of major-general to command the national guard or as a brigadier-general, unless that person has served ten (10) years as a commissioned officer of the national guard or army of the United States. No person shall be eligible for appointment to any staff, other than the governor's honorary staff, corps or department unless that person has the technical training requisite to qualify for such appointment, to be determined by the examining board appointed for the purpose.

Ind. Code

10-2-3-5 National guard; officers; eligibility; preference in appointment

Section 5. No person shall be commissioned as an officer of the national guard . . . unless that person has successfully passed such tests as to physical, temperamental, and professional fitness

as may be prescribed by the laws and regulation s applicable to the federally recognized national guard . . . .

Ind. Code

10-2-3-6 National guard; officers; discharge; inactive national guard

Section 6. At any time, the moral character, capacity, and general fitness for the service of any national guard officer may be determined by an efficiency board of three (3) commissioned officers, senior in rank to the officer whose fitness for service shall be under investigation, such board to be convened by the governor, and if the findings of such board shall be unfavorable to such officer and be approved by the governor, the officer shall be discharged . . . .

Ind. Code

10-2-3-7 National guard; officers; oath

Sec. 7. Each commissioned officer of the national guard of Indiana before entering upon the duties of his office, shall take and subscribe to the following oath, or such other oath as may be required by national guard regulations:

"I, _____, do solemnly swear that I will support and defend the Constitution of the United States and the constitution of the state of Indiana against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I will obey the orders of the President of the United States and the governor of the state of Indiana, that I make this obligation freely, without any mental reservation or purpose of evasion, and that I will well and faithfully discharge the duties of the office of _____, in the national guard of the state of Indiana upon which I am about to enter, so help me God."

Ind. Code

10-2-3-10 Uniform code of military justice; customs and usage of armed forces of the United States

Sec. 10. All matters relating to organization, commissioning and separation of officers . . . discipline, and government of the national guard, not otherwise provided in IC 10-2, shall be decided by the uniform code of military justice governing the armed forces of the United States, the regulations, customs, and usage of the armed forces of the United States and/or national guard regulations.

Ind. Code

10-2-7-11 Trustee; other funds; separate funds

Sec. 11. The governor, as trustee, is hereby authorized to receive from the secretary of defense of the United States, such funds, designated as "Other Funds," as are now in the custody of the secretary of defense, and which were collected by certain national guard organizations of this state for their own use and benefit . . . . The governor, as trustee, is likewise authorized to receive from any branch of the United States government any military funds which may at any time be recovered from the United States government. The funds so received shall be paid into the state treasury and shall be kept as a separate and distinct fund and shall be distributed for the benefit of the national guard of this state, and such sums are hereby appropriated, in such manner as the governor, in his discretion, shall determine.

INDIANA CIVIL RIGHTS COMMISSION

Gloria K. O'Shell

vs.

Indiana Army National Guard

DOCKET NO.
EMse91020205
EEOC NO. 240910017

The Indiana Civil Rights Commission has administratively dismissed the above-referenced case, for the following reasons:

_X_ 4. Lack of Jurisdiction *(explanation below)

* Complainant's relationship with Respondent was as a uniformed member of the U.S. armed forces and not as an employee within the meaning of the Indiana Civil Rights Law.

Date: 6/25/91 /s/ Karen M. Freeman-Wilson
Karen M. Freeman-Wilson, Director
Indiana Civil Rights Commission

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Office of Federal Operations
P.O. Box 19848
Washington, D.C. 20036

August 16, 1991

Gloria K. O'Shell
1909 N New Jersey Street
Indianapolis, Indiana 46202

Re: Appeal No. 01912718

Dear Ms. O'Shell:

This is in reference to correspondence which the Office of Federal Operations recently received.

_X_ Your appeal is premature. You may, however, file a new appeal when a final decision is issued in your case. See enclosure.

/s/ Dolores L. Rozzi, Director
Dolores L. Rozzi, Director
Office of Federal Operations

Enclosure

cc: Department of the Army
C. & C. R., SFMR-RBE
1941 Jefferson Davis Hwy.
Arlington, Virginia 22202-4508

DEPARTMENT OF THE ARMY
(SEAL) OFFICE OF THE ASSISTANT SECRETARY
(SEAL)
WASHINGTON, D.C. 20310-1813

23 July 1991

SFMR-RBE

Ms. Dolores L. Rozzi, Director
Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 19848
Washington, DC 20036

Re: Complaint of Gloria K. O'Shell
and M.P.W. Stone, Secretary,
Department of the Army
Docket Number: 01.91.2718

Dear Ms. Rozzi:

Referenced appeal is not properly before the Office of Federal Operations as an appeal to a final agency decision. Rather, appellant contends that her EEO complaints are not being timely and properly processed. I have directed an inquiry into her allegations. It is the intent of the Department of the Army that appellant is accorded due process in a timely manner.

/s/ Stanley L. Kelly, Jr.
Stanley L. Kelly, Jr.
Deputy Director, Equal Employment Opportunity
Compliance and Complaints Review Agency

cf:
SAAA-EO